STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
v	No. 293134 Oscoda Circuit Court
RICHARD ANDREW CUNNINGHAM, Defendant-Appellant.	LC No. 08-001021-FC

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his conviction by a jury of first-degree murder, MCL 750.316, of his live-in girlfriend. We affirm.

The victim was found with no signs of life at around 3:00 a.m. by emergency medical personnel who responded to a 911 call made by defendant approximately half an hour earlier. Blood and feces were evident in various places around the house; much of it was later tested and found to match the victim's DNA. The victim had a cut behind her ear that was not bleeding. The bathtub was wet from the bottom to a depth of three to four feet. An autopsy found extensive bruising all over the victim's face and body, many of which were described as potentially defensive wounds. The autopsy also found the victim to have serious internal injuries consistent with a very forceful impact to the abdomen. The injuries to the victim's neck were consistent with manual strangulation.[1] Defendant had a blood alcohol level of .31 and had recently taken morphine.

Defendant claimed that the victim had been his girlfriend of 20 years, that they had not spoken to each other much that day, that the victim had come home from being out with friends and was stumbling around. He stated that he was watching television when he heard a thump from the bedroom, and upon investigation, the victim was lying down and had defecated on herself. He stated that he helped move her to the bathroom, where he removed her pants and

[1] Another pathologist disputed the conclusion that the victim had been manually strangled, but that pathologist also confused two pictures of the victim's abdomen as the victim's neck.

turned on the shower, and when he returned to the bathroom ten minutes later, the victim was under water in the bathtub. He variously stated that he performed CPR for 20 or 45 minutes. He explained that a still-warm rug had been rolled up and moved outside because it had blood and feces on it, and a pool of red liquid found by the computer was cat vomit. Defendant offered several possible ways in which the victim got her cut, including slipping on ice or hitting herself on a faucet. He eventually admitted that he and the victim had had a violent confrontation that included throwing a chair at her.

Defendant raises several evidentiary issues on appeal. First, defendant argues that his due process rights were violated when evidence of his two prior arrests for domestic violence was introduced. Specifically, defendant contends that two recorded statements he made to the police—that he had prior domestic violence arrests five and ten years ago involving the victim and that "[he] never threatened to beat her up but year, years ago we both used to beat the crap outta each other"—should not have been admitted. He further argues that trial counsel was ineffective for failing to object and that the trial court should have granted a mistrial after the evidence of his prior arrests was produced.[2] We disagree.

Other acts by a criminal defendant are inadmissible to prove character except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The list is not exclusive. *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000). For evidence of other acts to be admissible under MRE 404(b), it must: (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The admissibility of other acts evidence will be reversed on appeal only when there has been a clear abuse of discretion, *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005), and it appears more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 725

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[2] The trial court actually did rule that the evidence of defendant's prior arrests was inadmissible. However, that evidence was presented to the jury through a recorded statement defendant made to the police, which was played for the jury.

(2005). Defendant's theory of his case was that the victim was intoxicated and died by accidentally falling. A proper purpose for admitting other acts evidence would be to show that the victim's death was not an accident or that defendant had some kind of intent to cause harm to the victim. We find that the other acts evidence here was introduced for a proper purpose.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the case more probable or less probable than it would be without the evidence." MRE 401. Evidence of misconduct similar to that charged is logically relevant to show that the charged act occurred if the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007). The evidence of defendant's prior arrests for domestic violence and that he and the victim "used to beat the crap outta each other" is relevant to show that defendant was violent toward the victim, as charged.

The trial court initially ruled that the evidence of the prior arrests was inadmissible because the jury would likely have given it disproportionate weight, particularly because defendant was only arrested, not convicted, on both occasions. See MRE 403; *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008). The trial court's ruling was not an abuse of discretion, but admission of the evidence would not have been, either, particularly under the circumstances here, where the trial court advised the jury that the cases of defendant's prior arrests had been dismissed and were not evidence in the current trial. In any event, the trial court instructed the jury to disregard the testimony, and juries are presumed to follow their instructions. *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

The trial court did not explain why it ruled that defendant's statement about how he and the victim "used to beat the crap outta each other" was admissible, but we agree on several grounds. We find no danger of unfair prejudice, MRE 403, because defendant made the statement seemingly to explain the historical context that the relationship involved mutual violence, rather than relating evidence about a propensity for violence toward the victim.[3] MRE 801(d)(2)(A) provides that a statement offered against a party is not inadmissible hearsay where it is "the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles." And as discussed, because it is relevant, there is no danger of unfair prejudice, and it was offered for a proper purpose, it would have been admissible under MRE 404(b).

To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the

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[3] Therefore, MCL 768.27b does not preclude its admission. MCL 768.27b provides that where a defendant is accused of an offense involving domestic violence, evidence of his commission of other acts of domestic violence is admissible for any purpose for which it is relevant unless excluded by MRE 403. *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008).

defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Here, trial counsel actually obtained a ruling from the trial court that evidence of defendant's prior arrests was inadmissible, and trial counsel asked for a mistrial when it was introduced anyway. As discussed, we find that admission of this evidence would have been permissible, and given all that trial counsel did to attempt to keep it from the jury, we fail to see how trial counsel's performance was deficient. Although trial counsel did not object to the introduction of defendant's statement about him and the victim "beat[ing] the crap outta each other," trial counsel did attempt to obtain a ruling that it was inadmissible. A subsequent objection would have been futile, and trial counsel cannot be faulted for failing to engage in futility. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008).

We therefore conclude that the trial court did not err in admitting the evidence of defendant's other acts, and trial counsel was not ineffective for failing to respond to that evidence in a different way. There was, additionally, considerable independent evidence, such as several witnesses who testified to statements made by the victim about defendant being violent toward her near the time of her death. A witness also testified to defendant's angry demeanor and threats against the victim during the hours before she was killed. There was physical evidence indicating that defendant assaulted the victim on the evening of the murder; and a forensic pathologist described the victim's extensive internal and external injuries, which led him to conclude that the victim died by homicide from strangulation and blunt force trauma. Defendant was not unduly prejudiced by admission of this evidence.

Next, defendant argues that the trial court erred in admitting statements that the victim made to her friends on the day of her death. Defendant argues that they were inadmissible hearsay not within any exception. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Starr*, 457 Mich at 494. An abuse of discretion exists if the results are outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We find no abuse of discretion.

Unsworn, out-of-court statements offered to prove the truth of the matter asserted are hearsay and generally inadmissible unless they fit an exception to the rule. MRE 801(c); MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Statements of presently-existing mental, emotional, and physical conditions are one exception. MRE 803(3); *People v Moorer*, 262 Mich App 64, 68-69; 683 NW2d 736 (2004). However, when such a statement includes matters beyond purely state of mind, such as events leading up to that state of mind, additional considerations must be addressed in deciding whether the statements are admissible. *Id.* at 69. The *Moorer* Court set forth the following guidelines:

> [A] victim may assert that the defendant's acts caused the state of mind. The truth of those assertions may coincide with other issues in the case, as where the defendant is charged with acts similar to those described. In such circumstances, the normal practice is to admit the statement and direct the jury to consider it only as proof of the state of mind and to disregard it as evidence of the other issues. Compliance with this instruction is probably beyond the jury's

> ability and almost certainly beyond their willingness. Where substantial evidence has been admitted on the other act, probably little harm results. However, where the mental state is provable by other available evidence and the danger of harm from improper use by the jury of the offered declarations is substantial, the trial judge should exclude the statements or prohibit the witness from giving the reasons for the state of mind. [262 Mich App at 69.]

Analysis of admissibility of these statements requires that the nature of each statement be considered specifically, as well as the purpose for each statement's admission. *People v Smelley*, 285 Mich App 314, 324; 775 NW2d 350 (2009). The trial court ruled on the victim's statements generally, rather than specifically. Nonetheless, we find no abuse of discretion.

A victim's state of mind is relevant in homicide cases when the defense argues the death was an accident. *Smelley*, 285 Mich App at 325. The victim described her fear about returning home and plans regarding the future, showing that discord and violence in the home motivated her feelings and plans to end the relationship, which, witnesses testified, upset defendant. This information starkly contrasted with defendant's accident theory. The events that the victim referenced were inherently a part of demonstrating her relevant state of mind. Additionally, the trial court properly noted additional indications that her statements were reliable because they described events and statements in proximity to her death.

Some of her statements also described domestic violence, both physical and psychological, directed at her by defendant.[4] The victim stated, among other things, that defendant choked her, which was particularly compelling given the medical evidence that the victim died by manual strangulation. This testimony may have served the dual purpose of proving that defendant was violent with the victim. However, the possibility that evidence might be used for an improper purpose is not necessarily a basis for excluding it if it was relevant and admissible under at least one proper theory. See *People v Bauder*, 269 Mich App 174, 187-189; 712 NW2d 506 (2005). The victim's state of mind was a significant factor, and evidence showing circumstantially that she feared defendant is highly relevant to whether her death was accidental. *People v White*, 401 Mich 482, 504; 257 NW2d 912 (1977). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008). In any event, there was considerable other evidence of defendant's guilt, including medical testimony and witnesses to defendant's desperate, hostile, and threatening demeanor towards the victim on the night that she died.

Defendant also argues that the contents of the victim's death certificate and a lab report were admitted in violation of his right to confront witnesses against him, US Const, Am VI, and that trial counsel was ineffective in failing to object to admission of this evidence. The death certificate was prepared by the county medical examiner and admitted during the testimony of the county medical investigator, who supplied the information on which the certificate was

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[4] For example, defendant played "Russian roulette" with her and provided her with a gun while encouraging her to kill herself.

based. The lab report was prepared by a laboratory in Virginia that analyzed blood samples collected at the crime, and a State Police forensic scientist testified about the contents of the report, which matched numerous blood samples to the victim's DNA. Because this issue was unpreserved, we review for plain error that affected substantial rights, meaning it affected the outcome of the proceedings. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

Public records are not testimonial and are generally admissible without confrontation because they are created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial. *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527, 2539-2540; 175 L Ed 2d 314 (2009). The Confrontation Clause protections are not dependent on "the vagaries of the rules of evidence." *Crawford v Washington*, 541 US 36, 61; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *United States v Garcia-Meza*, 403 F3d 364, 370 (CA 6, 2005). But state hearsay rules may govern the admissibility of non-testimonial hearsay. *Crawford*, 541 US at 68. Under MRE 803(9), death certificates are exceptions to the hearsay exclusion as records made to a public office pursuant to the requirements of law. Therefore, admission of the death certificate did not violate the Confrontation Clause and defendant's trial counsel was not ineffective for failing to make a futile objection. *Unger*, 278 Mich App at 256.

Plaintiff concedes that the lab report was inculpatory testimonial hearsay prepared by a non-testifying analyst who was not shown to be unavailable or previously cross-examined. Its admission therefore violated defendant's Confrontation Clause rights. *People v Payne*, 285 Mich App 181, 198; 774 NW2d 714 (2009). However, we cannot conclude that defendant was harmed by its admission or by trial counsel's failure to object to it. There was ample evidence of defendant's guilt independent of the DNA evidence. There was testimony of blood stains throughout the home where the victim was home alone with defendant, and that the victim was found in the bathtub with a laceration on her head. There was medical evidence that the victim received substantial injuries, including two lacerations on her head. There were witnesses to defendant's desperation, aggressively hostile demeanor, and threats on the night that the victim died. There was evidence of injuries leading a pathologist to conclude that the victim died from blunt force trauma and manual strangulation. Any evidentiary error or ineffective assistance by trial counsel does not require reversal because the error did not affect defendant's substantial rights. *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009); *Jordan*, 275 Mich App at 667.

Criminal defendants are entitled to fair trials, not to perfect trials. *People v Miller*, 482 Mich 540, 559-560; 759 NW2d 850 (2008). We find no errors that cast doubt on the outcome of this case or on the integrity of the judicial process. Defendant received a fair trial, and the evidence against him would have been substantial even without the evidence defendant claims should have been excluded. Defendant received a fair trial.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause